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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-728

HAROLD FRANKS AND JOHNNIE LEE,
Petitioners,

v.

BOWMAN TRANSPORTATION COMPANY, INC., *et al.*

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED STEELWORKERS OF AMERICA, AFL-CIO, AND FOR AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

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Respondent United Steelworkers of America, AFL-CIO, and American Federation of Labor and Congress of Industrial Organizations, as amicus curiae, file this supplemental brief to call the Court's attention to, and to briefly describe, the Fifth Circuit's decision in *Watkins* v. *United Steelworkers of America,* 516 F.2d 41, issued on July 16, 1975, subsequent to the filing of our main brief.

In our main brief, we urged an interpretation of Title VII which would distinguish between two types of cases in which minority employees seek seniority relief. On the one

hand are cases such as the instant case, where the actual victims of discrimination seek the seniority standing they would have had but for the discrimination—their "rightful place." We argued that in this situation the claimants are entitled to the relief they seek. On the other hand are cases in which minority employees who are not themselves victims of discrimination seek enhanced seniority as reparation for a history of prior discrimination against *others*. We argued that in this situation the claimants are *not* entitled to the relief they seek—indeed, that this is the very result which Sections 703(h) and (j) were enacted to prevent. Those provisions made clear what Congress had intended all along: that victims of discrimination should be made whole, but minority preferences should not be permitted. We cited the district court's decision in *Watkins,* 369 F. Supp. 1221 (E.D. La. 1973), as an example of failure to recognize the Congressional "cutting line", for the court there awarded enhanced seniority protection to minority employees who had never suffered discrimination.

The Fifth Circuit has now reversed the district court's decision in *Watkins,* and adopted the precise interpretation of Title VII for which we contend. The court's opinion begins by reciting its "precise holding", 516 F.2d at 44:

> "We hold that, regardless of an earlier history of employment discrimination, when present hiring practices are non-discriminatory and have been for over ten years, an employer's use of a long-established seniority system for determining who will be laid-off, and who will be rehired, adopted without intent to discriminate, is not a violation of Title VII or Section 1981, even though the use of the seniority system results in the discharge of more blacks than whites to the point of eliminating blacks from the work force, where the individual employees who suffer layoff under the system have not themselves been the subject of prior employment discrimination."

The court explained that each of the plaintiffs, who was hired when he first applied and enjoyed a seniority date coincident with his hiring date,

> "has his rightful place in the employment hierarchy, without regard to race. . . . Each is treated equally with white persons who have places equal to his in the hierarchy. No individual black employee is, because of his race, more likely than his white counterpart to be affected by the applicable criteria, seniority." *Ibid.*

The court concluded that to grant the plaintiffs seniority preference in these circumstances would constitute "preferential treatment on the basis of race which Congress specifically prohibited in Section 703(j)." *Id.* at 46. The court further held that Section 703(h) precludes an award of enhanced seniority which is not necessary to enable employees to reach their "rightful place." *Id.* at 46-47. The court observed that this analysis would remain correct even if this Court reverses in the instant case (as petitioners and we urge that it should):

> "Although the Supreme Court has issued a writ of certiorari for *Franks* so that the holding there will be reviewed, a contrary holding in *Franks* would not change the soundness of denial of fictional seniority relief to those who suffered no personal discrimination, as is the case here." *Id.* at 47.

The Fifth Circuit discerned a clear Congressional distinction between "remedial and preferential treatment." *Id.* at 47. Reviewing the legislative history, the court concluded:

> "It is quite apparent that, regardless of what that history may show as to Congressional intent concerning the validity of seniority systems as applied to persons who have themselves suffered from discrimination, there was an express intent to preserve contractual

rights of seniority between whites and persons who had not suffered any effects of discrimination." *Id.* at 48.

Turning to the district court's alternative reliance upon 42 U.S.C. § 1981, the court found it unnecessary to investigate the extent to which the scope of § 1981 should be reconciled with that of Title VII (*id.* at 49-50), for it found no violation of § 1981:

> "[T]he black plaintiffs received the identical employment benefits, terms and conditions as their white counterparts. The collective bargaining agreement was, in fact, color blind. . . . The layoff provision of the instant seniority system is not only facially nondiscriminatory; it does not perpetuate the effects of past discrimination as to these plaintiffs. When hired, these plaintiffs obtained the same contract rights as white citizens then hired. Blacks are guaranteed the same rights as whites under Sec. 1981, not greater rights. Long v. Ford Motor Co., 496 F.2d 500, 505 (6th Cir. 1974)". *Id.* at 50.

The court carefully delineated two issues which it was *not* deciding:

> "We specifically do not decide the rights of a laid-off employee who could show that, but for the discriminatory refusal to hire him at an earlier time than the date of his actual employment, or but for his failure to obtain earlier employment because of exclusion of minority employees from the work force, he would have sufficient seniority to insulate him against layoff." *Id.* at 45.

The first of these, of course, is the instant case. We have already explained, in our main brief, why such an employee *should* be awarded his "rightful place" seniority. The second situation not reached in *Watkins* is not presented here either. It would arise in a case where an employee who

had not applied for employment earlier claimed that he would have done so but for his knowledge that the employer did not hire minorities and thus that application would have been futile. What rights, if any, Title VII gives to individuals who have not made application for employment depend upon the resolution of several considerations, including problems of proof such as those discussed by this Court in *Blue Chip Stamps* v. *Manor Drug Stores,* 43 U.S. 4707 (June 9, 1975), and the question of standing discussed in *Jackson* v. *Sargent,* 394 F.Supp. 162, 168-169 (D. Mass. 1975). These considerations can, of course, best be assessed on a record in which such a claim is advanced.

Respectfully submitted,

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October 29, 1975

Mr. Michael Rodak, Jr., Clerk
Supreme Court of the United States
Washington, D. C. 20543

Re: Franks v. Bowman Transportation Co. (No. 74-728)

Dear Mr. Rodak:

In this case, respondent United Steelworkers of America, AFL-CIO (USWA), has filed a joint brief with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), which received the consent of all parties to file as an amicus curiae. When that brief was filed, you questioned the appropriateness of a party and an amicus curiae filing a joint brief. We explained that there were unique circumstances which made a joint brief appropriate here. Upon hearing our explanations, you asked that we reiterate in writing our reasons.

USWA is the largest affiliate of the AFL-CIO. Counsel for USWA and counsel for the AFL-CIO work closely together in a wide variety of matters; indeed, they are in virtual daily communication. It is inevitable, therefore, that whenever certiorari is granted in a case to which USWA is a party, counsel for USWA and for AFL-CIO discuss their respective views. This occurred when certiorari was granted in the instant case, and counsel discovered that the views of their clients exactly coincided, and further that their (counsel's) own thoughts as to how a brief should be structured likewise coincided.

These discoveries posed a dilemma. We thought it would be burdensome to the Court for USWA and the AFL-CIO to file separate briefs containing identical substantive discussions.

Of course, AFL-CIO might have opted not to file an amicus curiae brief at all, simply providing input into USWA's brief. But given the legal and social significance of this case, and the fact that USWA, although a respondent, agrees that petitioners are entitled to the relief they seek, it seemed to us important that the Court know that USWA's position is not aberrational, but rather reflects a view shared by the majority spokesman for the labor movement. In the circumstances, we concluded that the most appropriate course would be the filing of a joint brief.

It has now become appropriate to file a short supplemental brief discussing a decision which issued subsequent to the filing of our main brief, Watkins v. United Steelworkers of America, 516 F.2d 41 (fth Cir., July 16, 1975). To maintain consistency with our prior actions and for the same reasons as before, we have filed the supplemental brief jointly.

Sincerely,

Laurence Gold
Special Counsel, AFL-CIO

Michael Gottesman
Bredhoff, Gottesman, Cushman
and Cohen
Counsel for USWA

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